U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: JUN 1 1 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions with progressive post-baccalaureate experience equivalent to an advanced degree. The petitioner seeks employment as a special education teacher for The petitioner has taught at Maryland, since 2006. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions with the equivalent of an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel and copies of standardized test results.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions with experience equivalent to an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990, published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

In re New York State Dept. of Transportation (*NYSDOT*), 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner must establish that the alien will serve the national interest to a substantially greater degree than would an available United States worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The intention behind the term "prospective" is to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The USCIS regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on April 19, 2012. Asked, on that form, whether any petitions had previously been filed on her behalf, the petitioner answered "yes." filed a Form I-140 petition, with an approved labor certification, on her behalf on September 27, 2010, to classify her as a member of the professions under section 203(b)(3) of the Act. The Texas Service Center approved the petition on April 20, 2011, with a priority date of April 20, 2010.

In an accompanying introductory statement, counsel stated that the petitioner merits the national interest waiver due to her bachelor's degree; ten years of experience, "which was evaluated as equivalent to a Master's Degree in Special Education"; "the awards and recognitions received by her"; and her "Highly Qualified Teacher status."

Academic degrees, experience, and recognition such as awards are elements that can contribute toward a finding of exceptional ability. *See* 8 C.F.R. § 204.5(k)(3)(ii)(A), (B), and (F), respectively. Exceptional ability, in turn, is not self-evident grounds for the waiver. *See* section 203(b)(2)(A) of the Act. With respect to the petitioner's "Highly Qualified Teacher status," a June 13, 2007 letter from informed the petitioner that she met the Maryland High Objective Unified State Standard of Education, and therefore "may provide . . . instruction . . . in compliance with the federal *No Child Left Behind*, Act [*sic*] of 2001."

The petition included an 11-page "Personal Statement" signed by the petitioner, discussing her background and career. Referring to herself in the third person, the petitioner stated:

> She believes that if she is granted the opportunity to permanently work in America, she will be able to serve more special needs children especially those who are disadvantaged and belong to low-income families. She also believes that if she continues to work here as a special education teacher, she will be able to carry out her plan of helping in encouraging and training other Americans to become teachers of exceptional children. She wants to help in meeting the need for more special needs teachers in America so that all the exceptional American children will have a better education and consequently have a better life.

Regarding the phrase ". . . if she is granted the opportunity to permanently work in America . . . ," the petitioner was already the beneficiary of an approved immigrant petition a year before the filing date of the present petition. Therefore, the issue in the present petition is whether she qualifies for a higher classification than the one already granted to her. Approval of a second petition would not guarantee approval of an adjustment application. The approval of a visa petition vests no rights in the beneficiary of the petition, as approval of a visa petition is but a preliminary step in the visa application process. The beneficiary is not, by mere approval of the petition, entitled to an immigrant visa. *Matter of Ho*, 19 I&N Dec. 582, 589 (BIA 1988).

In her statement, the petitioner did not mention the *NYSDOT* guidelines or explain how she meets them. The petitioner expressed general goals such as "encouraging and training other Americans to become teachers of exceptional children," but the record does not show that the petitioner already has a significant track record with regard to those aspirations. Likewise, in witness letters, numerous teachers, administrators, students, and parents of students praised the petitioner's abilities and personal character, but did not claim that the petitioner's work has had an impact or influence outside of the school districts where she has worked. The petitioner's awards, as well, are local in nature, and do not show that the petitioner has had a wider impact on the field of special education.

The director issued a request for evidence on July 27, 2012, instructing the petitioner to "submit evidence to establish that the beneficiary's past record justifies projections of future benefit to the nation." In response, counsel cited the No Child Left Behind Act (NCLBA) and other government initiatives to reform and improve public education. Counsel contended that "the beneficiary's proposed employment as a 'Highly Qualified Special Educator' traverses the restrictive confines of physical and geographical limitation," because "the benefits that would be conferred spreads [*sic*] to the entire nation's economy and security." Counsel emphasized "the 'Urgent Need' for 'Highly Qualified Teachers,'" and claimed that the labor certification process cannot accommodate this need

because "[t]he United States Department of Labor minimum education requirement . . . for Elementary School teacher is just a bachelor's degree."

Section 9101(23) of the NCLBA defines the term "Highly Qualified Teacher." Briefly, by the statutory definition, a "Highly Qualified" elementary school teacher:

- has obtained full State certification as a teacher or passed the State teacher licensing examination, and holds a license to teach in such State;
- holds at least a bachelor's degree; and
- has demonstrated, by passing a rigorous State test, subject knowledge and teaching skills in reading, writing, mathematics, and other areas of the basic elementary school curriculum, or (in the case of experienced teachers not "new to the profession") demonstrates competence in all the academic subjects in which the teacher teaches based on a high objective uniform State standard of evaluation.

Section 9101(23)(A)(ii) of the NCLBA further indicates that a teacher is not "Highly Qualified" if he or she has "had certification or licensure requirements waived on an emergency, temporary, or provisional basis."

The *Occupational Outlook Handbook* describes what the Department of Labor considers to be the minimum qualifications necessary to become an elementary school teacher:

> Kindergarten and elementary school teachers must have a bachelor's degree. In addition, public school teachers must have a state-issued certification or license. . . .
>
> **Education**
> All states require public kindergarten and elementary school teachers to have at least a bachelor's degree in elementary education. Some states also require kindergarten and elementary school teachers to major in a content area, such as math or science. . . .
>
> Some states require kindergarten and elementary school teachers to earn a master's degree after receiving their teaching certification. . . .
>
> **Licenses and certification**
> All states require teachers in public schools to be licensed. A license is frequently referred to as a certification. . . .
>
> Requirements for certification vary by state. However, all states require at least a bachelor's degree. They also require completing a teacher preparation program and supervised experience in teaching, typically gained through student teaching. Some states require a minimum grade point average. States often require candidates to pass a general teaching certification test, as well as a test that demonstrates their knowledge of the subject they will teach. Although kindergarten and elementary

> school teachers typically do not teach only a single subject, they may still be required to pass a content area test to earn their certification.[1]

The petitioner has not established that the "Highly Qualified" standard involves requirements that are significantly more stringent than those outlined in the *Occupational Outlook Handbook*, or that a public school could not obtain a labor certification for a "Highly Qualified Teacher." Indeed, the petitioner's own approved labor certification required her to hold a bachelor's degree in special education or elementary education, and to "have or be immediately eligible for Maryland Teaching Certificate," elements consistent with the "Highly Qualified" designation.

The director denied the petition on November 7, 2012, stating that the petitioner had not met the guidelines set forth in *NYSDOT*. On appeal, counsel asserts that section 203(b)(2)(B)(i) of the Act does not contain clear guidance on eligibility for the waiver, and claims that Congress subsequently filled that gap with the passage of the NCLBA. Counsel notes that Congress passed the NCLBA three years after the issuance of NYSDOT as a precedent decision, and claims that "[t]he obscurity in the law that NYSDOT sought to address has been clarified," because "Congress has spelled out the national interest with respect to public elementary and secondary school education" through such legislation. Counsel, however, identifies no specific legislative or regulatory provisions that exempt school teachers from *NYSDOT* or reduce its impact on them.

Counsel does not support the assertion that the NCLBA modified or superseded *NYSDOT*; that legislation did not amend section 203(b)(2) of the Act. In contrast, section 5 of the Nursing Relief for Disadvantaged Areas Act of 1999, Pub. L. 106-95 (November 12, 1999), specifically amended the Immigration and Nationality Act by adding section 203(b)(2)(B)(ii) to create special waiver provisions for certain physicians. Because Congress not only can amend the Act to clarify the waiver provisions, but has in fact done so in direct response to *NYSDOT*, counsel has not shown that the NCLBA indirectly implies a similar legislative change.

Counsel states:

> With respect to the E21 visa classification, INA § 203(b)(2)(A) provides in relevant part that: "Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the **national . . . educational interests**, . . . of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

Counsel, above, highlighted the phrase "national educational interests," but the very same quoted passage also includes the job offer requirement, *i.e.*, the requirement that the alien's "services . . . are sought by an employer in the United States." Counsel has, thus, directly quoted the statute that supports the director's conclusion. By the plain wording of the statute that counsel quotes on appeal, an alien professional holding an advanced degree is presumptively subject to the job offer

[1] Source: http://www.bls.gov/ooh/education-training-and-library/kindergarten-and-elementary-school-teachers.htm#tab-4 (printout added to record May 23, 2013).

requirement, even if that alien "will substantially benefit prospectively the national . . . educational interests . . . of the United States." Neither the Immigration and Nationality Act nor the No Child Left Behind Act, separately or in combination, create or imply any blanket waiver for teachers.

Counsel asserts that the benefit arising from the petitioner's work is national in scope because of the "national priority goal of closing the achievement gap." Counsel conflated the national importance of "education" as a concept, or "educators" as a class, with the impact of one teacher. A local-scale contribution to an overall national effort does not meet the *NYSDOT* threshold.

Counsel, on appeal, states that the labor certification guidelines "require only a bachelor's degree" for special education teachers, and therefore "would not meet the objective of employers to hire highly qualified teachers pursuant to No Child Left Behind." Elsewhere in the same brief, however, counsel acknowledges that the statutory definition of a "Highly Qualified Teacher" requires only a bachelor's degree. Counsel does not reconcile these contradictory claims.

Counsel states that a waiver would ultimately serve the interests of United States teachers, because if schools "fail to meet the high standard required under the No Child Left Behind (NCLB) Law," the result would be "not only . . . closure of these schools but [also] loss of work for those working in those schools." Counsel does not document "closure of . . . schools" for failing to meet NCLBA requirements, and the record does not show that the petitioner's work has brought schools closer to meeting the NCLBA's achievement requirements. Rather, citing printouts submitted on appeal, counsel states: "The 2012 MSA [Maryland State Assessment] Reading results show that out of the 24 Maryland school districts ranked near the bottom at the 'All Student' level for each MSA-covered grade level." Counsel adds: "it is noteworthy that the updated 2012 Maryland Report Card shows that did not meet its Reading proficiency AMO targets." The petitioner has worked for since 2006, and thus had been there for a number of years before the administration of the 2012 MSA tests.

Counsel states that the petitioner "is an effective teacher in raising student achievement in STEM" (science, technology, engineering and mathematics) but cites no evidence to support that claim. The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). As a special education teacher, it is not evident that the petitioner emphasizes STEM in her teaching. Even if the petitioner had documented her "proven success in raising proficiency of her students," it does not follow that the petitioner has had an impact or influence outside of PGCPS.

Counsel contends that factors such as "the 'Privacy Act' protecting private individuals" make it "impossible" to compare the petitioner with other qualified workers. Counsel's contention rests on the incorrect assumption that the *NYSDOT* guidelines amount to little more than an item-by-item comparison of an alien's credentials with those of qualified United States workers. The key provision, however, is that the petitioner must establish a record of influence on the field as a whole. To do so does not require an invasive review of other teachers' credentials.

Counsel claims: "the Immigration Service is requiring more from the beneficiary's credentials and tantamount to having exceptional ability," even though one need not qualify as an alien of

exceptional ability in order to receive the waiver. As noted previously, the threshold for exceptional ability is below, not above, the threshold for the national interest waiver. It remains that the petitioner's evidence does not facially establish eligibility for the national interest waiver. The director did not require the petitioner to establish exceptional ability in her field. Instead, the director observed that the petitioner's evidence does not show that the petitioner's work has had an influence beyond the school districts where she has worked.

Counsel cites a high turnover rate among special education teachers, which is a general observation rather than a fact specifically in the petitioner's favor. At best, this information shows that there is a demand for credentialed special education teachers, a demand that the labor certification process can – and, in this instance, did – address. Counsel, in effect, claims that the petitioner would have difficulty obtaining a benefit that she has, in fact, already secured.

Much of the appellate brief consists of general statements about educational reform and discussion of perceived flaws in the labor certification process. It is within Congress's power to establish a blanket waiver for teachers, "highly qualified" or otherwise, but contrary to counsel's assertions, that waiver does not yet exist.

It is evident from a plain reading of the statute that engaging in a profession (such as teaching) does not presumptively exempt such professionals from the requirement of a job offer based on national interest. Congress has not established any blanket waiver for teachers. Eligibility for the waiver rests not on the basis of the overall importance of a given profession, but rather on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.